to his client according to exh P6 were 100,000 Central Securities Holdings Bhd's shares and contended that it showed that they were not Ganda Holdings Bhd's shares. He contended that although the defendant did not plead the substitution of a new contract, the plaintiff's evidence referred to a new contract and the learned judge found it to be so. He contended that the learned judge had come to the right conclusion albeit for wrong reasons.

In his reply Mr Subramaniam pointed out that in his statement of defence the defendant never pleaded that wrong shares were delivered. He also referred to his submission in the court below when he had pointed out that Central Securities (Holdings) Bhd was the former name of Ganda Holdings Bhd.

We would point out that this court has recently once again stressed the importance of pleadings in *Muniandy & Anor* v *Muhammad Abdul Kader & Ors*[3] in which Mohamed Azmi SCJ stated at p 418 that:

> Unless the objection raised is merely technical, the importance of pleadings can be found in many authorities. The most instructive is perhaps by Lord Diplock in *Hadmor Productions* v *Hamilton* [1983] 1 AC 191 at p 233:
>
> 'Under our adversary system of procedure, for a judge to disregard the rule by which counsel are bound, has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice, the right of each to be informed of any point adverse to him that is going to be relied upon by the judge, and to be given the opportunity of stating what his answer to it is ...'

As the High Court had made a decision on an issue which was not raised by the parties in their pleadings, the appeal in this case must be allowed and the order of the learned judge in dismissing the plaintiff's claim set aside. As there is evidence which was accepted by the learned judge that the defendant had agreed to pay the plaintiff to settle the matter concerning the written contract entered into by them on 14 July 1981, and taking into account that $35,000 deposit had been paid to the plaintiff earlier on, we therefore ordered the defendant to pay the plaintiff $35,000 together with interest at the rate of 8% pa from the date of the judgment of the High Court to the date of realization and costs here and in the court below. The deposit of $500 was also ordered to be refunded to the plaintiff.

Appeal allowed.

Solicitors: *Maxwell Kenion Cowdy & Jones*; *Tay Leong Siak & Co.*

Reported by *Prof Ahmad Ibrahim*

Hiap Yiak Trading Sdn Bhd & Ors v Hong Soon Seng Sdn Bhd

HIGH COURT (MUAR) — ORIGINATING MOTION NO 25-11 OF 1989
RICHARD TALALLA JC
25 FEBRUARY 1990

Land Law — Agreement for sale and purchase of land — Whether a loan or sale — Triable issues — Caveat against own land by registered proprietor — Second caveat after withdrawal of first caveat — Application for removal of caveat by purchaser — Whether should be removed

In this application, the plaintiffs applied for the removal of a caveat lodged by the defendants who are the registered proprietors of the land. The plaintiffs claim that the first four plaintiffs were purchasers of the land which they subsequently sold to the fifth plaintiff. The defendants deny selling the land and contend that the true transaction was one in which they borrowed money from the first plaintiff in order to prevent an auction of the land by a bank.

After discharge of the charge by the bank, the issue document of title to the land was handed to the common solicitors. No transfer has been executed. The title remains in the name of the defendants. The defendants have commenced proceedings in which they claim the return of the land. In order to protect their interest, they caused the caveat to be entered against the land, after having voluntarily withdrawn an earlier caveat.

Held, dismissing the plaintiffs' application:

(1) The defendants were entitled to cause a caveat to be entered against the land notwithstanding that they are its registered proprietors.

(2) The onus is on the defendants as caveators to satisfy the court that on the evidence presented, their claim to the land raises a serious question to be tried. The defendants must show that on the balance of convenience, it is better to maintain the status quo until the trial of the action, by preventing the plaintiffs from disposing of the land to some third party. The court was satisfied that such onus has been discharged. The nature of the agreements and the amounts described as compensation or damages are issues that should be tried.

(3) The fact that the defendants had entered an earlier caveat which they subsequently withdrew voluntarily does not prevent them from entering a second caveat.

[*Editorial Note*: The plaintiffs have appealed to the Supreme Court vide Civil Appeal No 02-101 of 1990.]

Cases referred to

1 *Societe Generale* v *Good Property Land Development Pte Ltd* [1989] 2 MLJ 24 (folld)
2 *Eng Mee Yong & Ors* v *V Letchumanan* [1979] 2 MLJ 212 (folld)
3 *Hock Hin Bros Sdn Bhd* v *Low Yat Holdings Sdn Bhd* [1984] 1 MLJ 92 (folld)

Subra Naicker for the first, second, third and fourth plaintiffs.
Wong Kim Fatt for the fifth plaintiff.
AK Yeong for the defendants.

Cur Adv Vult

Richard Talalla JC: The defendants are the registered proprietors of certain land held under EMR 3261 lot no 3019, mukim of Jalan Bakri in the District of Muar in the State of Johore ('the land'). The plaintiffs claim that the first four plaintiffs were purchasers of the land which they subsequently sold to the fifth plaintiff. The defendants deny selling the land at all. They say that the agreement by virtue of which the first four plaintiffs claim to have purchased the land from them is in fact a sham and that the true transaction was one in which they borrowed money from the first plain tiff (Hiap Yiak). The defendants say that they have no knowledge of the second, third and fourth plaintiffs other than that they are named as purchasers in the sham agreement.

In support of their allegation, the defendants state that in 1980 the land stood charged to United Asian Bank Bhd ('the bank') as security for a loan of $400,000 which they had obtained from the bank. They defaulted under the charge. On 18 March 1984, the bank obtained an order from Pemungut Hasil Tanah, Muar, for the sale of the land by public auction to recover a sum of $338,194.81. The auction was to take place on 23 April 1984. The defendants were in a quandary. Somehow they had to get hold of funds to pay off the bank to save the land from being auctioned. How were they to get the money to do this? The obvious source was a moneylender. Which moneylender? Hiap Yiak of course, because the defendants had borrowed from them before. They went to Hiap Yiak. They were in no position to bargain. Hiap Yiak were in a position to dictate terms, and they did. Instead of a loan agreement being drawn up, a sale agreement was entered into. It was dated 21 April 1984, two days before the auction date. The agreement provided for a sale price of $400,000 of which $100,000 was to be paid forthwith to the bank and this was in fact done through solicitors acting for both parties, that is to say the vendor and the purchasers. As to the balance of the purchase price of $300,000, $240,000 was to be paid on 20 May 1984 direct to the bank. The final balance purchase price of $60,000 was to be paid on 20 October 1985. There was a strange term in the sale agreement which was an option to buy back the land by way of the defendants returning $340,000 to the first four plaintiffs and an additional sum of $100,000 which last sum was said to be agreed compensation and/or predetermined damages to the first four plaintiffs, the option to be exercised on or before 20 October 1984 before payment. The agreement provided alternatively for the defendants to pay a sum of $100,000 on or before 20 October 1984 and thereby have the option to repurchase extended till 20 October 1985 but in this event the defendants would have to pay the four plaintiffs, a part from the sum of $340,000 received, a sum of not merely $100,000 but at that point of time $240,000 as so-called agreed compensation and/or predetermined damages, thus requiring the defendants to pay the four plaintiffs a total sum of $680,000.

The defendants were not able to pay any moneys on or before 20 October 1984 to the end that option be exercised or extended. So, two days later, that is to say on 22 October 1984, the parties entered into a supplementary agreement whereby the time for payment of the sum of $100,000 for the extension of the option was extended to 20 December 1984. Still the defendants could not pay. A third document was drawn up. It was entitled an agreement of sale of land and dated 22 April 1985. That agreement provided for sale of the land as in the first agreement but this time at a total price of $340,000 with an option to repurchase on or before 20 October 1985 at a sum of $500,000. The defendants again did not have the money to exercise the option.

The title deed to the land, after discharge by the bank of the charge, was handed to the common solicitors who apparently are holding it at this point of time. No transfer has been executed. The title remains in the name of the defendants.

It seems to me more than a coincidence that time relative to the auctioning of the land and the money transaction between the first four plaintiffs and the defendants dovetailed, as did the amounts payable under the charge to the bank and the moneys advanced by the first four plaintiffs to the bank through the common solicitors, albeit as alleged part payment of the price of the land. The amounts described in the various transactions between the first four plaintiffs and the defendants as compensation and/or predetermined damages cry out for trial as to whether those amounts are in truth and fact compensation or damages and if so compensation or damages for what? Or do the amounts represent interest?

The defendants claim that under normal circumstances there is no way that they would have sold the land for $400,000 as stated in the agreement. They say that it is amply evident that the land was at all material times worth $700,000, the reserve price of the land fixed by the Pemungut Hasil Tanah being $700,000. Furthermore, the defendants produced a valuation by a licensed valuer and appraiser whereunder the land was valued at $700,000.

The defendants in Muar High Court Civil Suit No 56 of 1988 commenced proceedings in which they pleaded, inter alia, the facts stated above and claimed the return of the land to them. Those proceedings are still on foot. In order to protect their interest in the land, the defendants caused a caveat to be registered against it. It would appear that they were entitled to do so notwithstanding that they are the registered proprietors of the land. See the case of *Societe Generale* v *Good Property Land Development Pte Ltd.*[1]

In these proceedings, the plaintiffs applied, inter alia, for an order that the caveat be removed. That being the case, it fell upon the defendants to satisfy the court that on the evidence presented their claim to the land raises a serious question to be tried. Having done so, the defendant must show that, on the balance of convenience, it is better to maintain the status quo until the trial of the action, by preventing the plaintiffs from disposing of the land to some third party. See the well known Privy Council case of *Eng Mee Yong & Ors* v *V Letchumanan*[2] at p 215.

I am satisfied that the onus placed on the defendants has been discharged. There was, to say the least, prima facie evidence that the land had a value of $700,000. Why then would the defendants sell it for $400,000? That question, let alone other matters, demands judicial inquiry.

It was argued on behalf of the plaintiffs that the defendants had lodged an earlier caveat which they subsequently withdrew voluntarily and that having done so it was not open to them to lodge a second caveat, the second caveat being effectively the same as the first. Unfortunately for the plaintiffs, the decision of Edgar Joseph J in *Hock Hin Bros Sdn Bhd* v *Low Yat Holdings Sdn Bhd*,[3] with which I respectfully agree, is against them.

I take the view that the status quo should remain and, accordingly, the defendants' caveat should stand unremoved. I dismiss the plaintiffs' application with costs to be taxed if not agreed.

Application dismissed.

Solicitors: *E Ramasamy & Co; AK Yeong & Co.*

Reported by *Zarinah Marican*

Lee Sen Lan & Anor v Mah Kwee Hock

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO F 1946 OF 1985
LIM BENG CHOON J
25 JANUARY 1990

Civil Procedure — Pleadings — Defence — Application to amend — Counterclaim for contribution — Whether cause of action based on tort — Whether action maintainable under Civil Law Act 1956 — Civil Law Act 1956, ss 8(3)(b) & 19(1)(c)

Damages (Personal Injury or Death) — Counterclaim for contribution — Right of contribution based on statutes — Right of contribution sui generis — Whether cause of action based on tort — Whether action maintainable under Civil Law Act 1956 — Civil Law Act 1956, ss 8(3)(b), (4) & 10(1)(c)

The plaintiffs were the administratrix and administrator of two deceased victims of an accident. In their joint statement of claim against the defendant, they alleged that the accident was caused solely by the negligence of the defendant. In his defence, the defendant alleged that the accident was caused wholly or in part by the negligence of the first deceased. No further steps were taken in the proceedings until two and a half years later when the defendant applied to amend his defence to include a counterclaim. The plaintiffs opposed the application by relying on s 8(3)(b) of the Civil Law Act 1956 ('the Act'), stating that the proposed counterclaim in tort was barred. The defendant argued that the claim for contribution was made pursuant to s 10 of the Act and was not caught by s 8(3)(b) as the proposed counterclaim was not based on tort but on contribution under s 10(1)(c).

Held, allowing the defendant's application:

(1) It is clear that s 8(3)(b) of the Act places a statutory injunction against the institution of an action in tort after the stipulated period. The defendant's amendment is not grounded on any tort but rather for contribution based on the failure on the part of the first deceased victim, in his own interest, to take reasonable care of himself and thereby contributed, by his want of care, to his own injury.

(2) The statutory right for contribution from a co-tortfeasor is a right sui generis. The cause of action for contribution does not arise until judgment but is a claim subsisting within s 8(4) of the Act and is not a cause of action in tort.

Cases referred to

1 *Harvey* v *RG O'Dell Ltd & Anor* [1958] 1 All ER 657 (folld)
2 *Brambles Construction Pty Ltd* v *Helmers* (1965-66) 39 ALJR 410; 114 CLR 213 (refd)

Legislation referred to

Civil Law Act 1956 ss 7, 8(3)(b), (4), 10(1)(c)
Law Reform (Married Women and Tortfeasors) Act 1935 [UK] s 6(1)(c)
Law Reform (Miscellaneous Provisions) Act 1934 [UK] s 1(3)(b)

V Rajendran for the plaintiffs.
Tunku Farik Ismail for the defendant.

Cur Adv Vult

Lim Beng Choon J: On 7 December 1985, the plaintiffs instituted this action against the defendant claiming